

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WSG 15

Date Signed: January 8, 1979

MEMORANDUM

SUBJECT: Questions and Answers on Non-Indian Water Supply Situations

FROM: Alan Levin, Director (signed by Alan Levin)
State Programs Division, ODW (WH-550)

TO: Regional Water Supply Representatives, I-X

Region V and X have during FY 78 requested information on the legal status of public water supply systems owned by Indian people but located on non-Indian land and non-Indian systems located on Indian land. The same questions were asked in meetings with the Indian Health Service.

The specific questions and answers follow:

1. First, what does the term, Indian land, mean?

Answer: The term "Indian land" is reservation land, land which is tribally owned, or land which is owned by individual Indians and which has not been shown to be under State jurisdiction by the attorney general to the satisfaction of the EPA regional counsel.

In order to exercise jurisdiction over Indians under the Safe Drinking Water Act, as amended, a State must clearly demonstrate that either a State enabling act, a Federal statute other than P.L. 280 as amended, or an applicable treaty with an affected Indian tribe grants the State sufficient civil and criminal jurisdiction to enforce drinking water regulations against public water systems on Indian land. As of the date of the signing of this Water Supply Guidance, there has been no such demonstration by a State. Unless a State can provide a clear showing of its jurisdiction, EPA will be required to assume primacy for the purposes of implementing the Safe Drinking Water Act on Indian lands. Thus, in 40 CFR §142.3(b)(2) there is a statement that a State with primacy must apply its regulations for the Safe Drinking Water Act to all public water systems except for:

...public water systems on Indian lands with respect to which the State does not have the necessary jurisdiction or its jurisdiction is in question....

2. What deciding factors should be used to establish jurisdiction - physical location, land ownership, or maintenance of the system?

Answer: The jurisdiction is based on criteria of the ownership and Federal trustee status of the land on which the system is located.

For example, when a system is on Indian land which is in trustee relationship with the Federal government, whether the system itself is owned or operated by a town, municipality, the Bureau of Indian Affairs (BIA), or an Indian tribe, EPA has jurisdiction and not the State.

3. Does an Indian owner/operator or a tribal owner/operator of a system located wholly on non-Indian land deal with the State agency or EPA?

Answer: Any water supply system on non-Indian land will come under the authority of the State or EPA, whichever has primacy over all other public water systems. Where an Indian tribe or BIA is the owner or operator of such systems they should deal with the agency which has primacy. The list of State agencies which have primacy can be obtained from the Office of Drinking Water, EPA, Washington, D.C. In a non-primacy State, the Public Water Supply Supervision Program for Indian lands, as well as the other areas of the State, is implemented by the EPA regional office.

4. Does a system located partially on non-Indian land and partly on Indian land come under authority of a State agency with primacy or under EPA?

Answer: This determination should be made on a case-by-case basis after discussion among the public water system, the State, the Indian people on whose land the system is located and the appropriate EPA regional office.

There may be situations where determination of who has primacy are complicated or where roles and responsibilities are vague. In general the sovereign status of the Indian people should be given due recognition. Split jurisdiction and specific roles for each agency may need to be worked out, and agree to. Historical precedent may be a basis for determination. The critical issue is that there be an effective public water supply supervision program and a specified agency to deal with the total water system, or with specific service areas of the water system.

5. Should States be involved in implementing the drinking water program for public water supply systems on Indian land?

Answer: Yes, however the degree of involvement of a State agency depends on the wishes of the affected Indian tribe and legal constraints of civil and criminal jurisdiction.

As a practical matter States should be involved in implementing programs, such as by conducting sanitary surveys and providing technical assistance, for water systems on Indian land if the Indian people or tribe agree to this arrangement. A formal written

agreement, such as a Memorandum of Understanding, may be helpful in defining roles and responsibilities.

It is important for EPA regions to realize in working out such agreements that from a legal standpoint even if a State does have primacy for public water systems on non-Indian land and in addition is willing to carry out a program for systems on Indian land, such systems are still under EPA regional primary enforcement responsibility. Thus, unless the State has shown that by express intent of Congress in an applicable treaty, a State enabling Act, or Federal statute other than P.L. 280, as amended, the State has sufficient civil and criminal jurisdiction over non-Indian public water criminal jurisdiction over non-Indian public water supplies on Indian land, the EPA and not the State is responsible for taking enforcement action.

This Water Supply Guidance (WSG) supplements and does not supplant WSG-10 and WSG-40 which establish criteria to judge whether a water system comes under primary enforcement responsibility of EPA or of a State. It should be remembered that WSG-10 stated that the determining factor was whether or not the land on which a public water supply system is located on Indian land. Water Supply Guidance 40 clarified and limited WSG-10 in saying States intending to extend primary enforcement responsibility to Indian water systems must demonstrate sufficient civil and criminal jurisdiction to enforce its State drinking water regulations on Indian lands.

NOTE: The 1986 Amendments allowed for granting of primacy for the PWSS Program to Indian Tribes if they met the criteria specified in the Act. Guidance on this has been issued separately.